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No. ~~39451-1-II~~

DIVISION II OF THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DARA RUEM,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 08-1-02685-1

SUPPLEMENTAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

ARGUMENT

The analysis referenced in State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005) controls the court's approach to the "independent source exception" in the instant case. In short, the independent source exception to the exclusionary rule still requires the incriminating evidence ultimately to have been obtained by a valid search warrant independent of the unlawful action. The facts in the search warrant affidavit independent of the unlawful action must constitute probable cause. Id. at 718.

The Gaines court analyzed the independent source exception in relevant part as follows:

> Under the independent source exception, evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action. See Warner, 125 Wn.2d at 888-89; O'Bremski, 70 Wn.2d at 429. This result is logical. According to the plain text of article I, section 7, a search or seizure is improper only if it is executed without "authority of law." But

> a lawfully issued search warrant provides such authority. See Ladson, 138 Wn.2d at 350. Furthermore, the inclusion of illegally obtained information in a warrant affidavit does not render the warrant per se invalid, provided that the affidavit contains facts independent of the illegally obtained information sufficient to give rise to probable cause. See State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 223 (1990); Franks v. Delaware, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Id.

The court recognized it is improper to rely on solely illegally obtained evidence as the basis for a search warrant, by offering the following analysis from Justice Dore in State v. Coates, 107 Wn2d 882, 735 P.2d 64 (1987). The Gaines court recognized the Coates application as follows:

> [Justice Dore] concluded that "a search warrant is not rendered totally invalid if the affidavit contains sufficient facts to establish probable cause independent of the illegally obtained information." Id. (discussing State v. Casal, 103 Wn.2d 812, 699 P.2d 1234 (1985); State v. Cord, 103 Wn.2d 361, 693 P.2d 81 (1985); State v. Cockrell, 102 Wn.2d 561, 689 P.2d 32 (1984)).

Upon this analysis, the court concluded the court's job is to determine whether probable cause existed to search absent impermissibly obtained information. See Id. at 720. The method for

doing this is to "strike all references to the initial, illegal search." Id.

In the case against Mr. Ruem, the Complaint for Search Warrant should be found insufficient to support applying the independent source exception to the exclusionary rule. See Supplemental Record, Complaint for Search Warrant, 5-6, CP ___. Just as the court prescribed in Gaines, this court must excise from the officer's probable cause statement that which was illegally observed during the officer's illegal entry. In the present case, as the court is aware, Appellant has argued in previous briefing that the entry under the arrest warrant was illegal. See Brief of Appellant and Reply Brief. (The "independent source exception" is only relevant for consideration if there is a "constitutional violation" that reveals incriminating evidence. State v. Gaines, 154 Wn.2d at 720.) When the court examines the relevant portions of the Complaint for Search Warrant it will note the only legally obtained information recited would not have, standing alone, led to a search warrant. Excising that which was obtained due to constitutional

violation, the Compliant for Search Warrant would only have included the following:

1. On June 4, 2008 deputies confirmed an outstanding warrant for Chantha Ruem;

2. The deputies looked for Chantha Ruem at 10318 McKinley Ave. E, the address listed on the arrest warrant;

3. The deputies believed Chantha lived in the trailer behind the main house at that address;

4. The deputies spoke with Dara Ruem at the trailer, learned a white car on the property belonged to Chantha, and that Chantha "should" be on the property;

5. The deputies asked to search the trailer;

6. After initially consenting to the search, Dara Ruem called off the search;

7. One of the deputies smelled burned marijuana.

See Complaint for Search Warrant, 5-6. CP ___.

The remaining information, having been procured through unconstitutional law enforcement actions, should be excluded from the probable cause statement. That information includes the team of police officers securing Dara Ruem, entering the trailer, finding "starter" marijuana plants, and securing the trailer. Again, Appellant has extensively briefed this subject in previous submissions to this court.

References to Sgt. Seymour observing 52 additional marijuana plants outside the trailer should be excluded as well. This is because Sgt. Seymour's presence at that location at that point in time was in anticipation of the search warrant that was being sought based upon the impermissible observations made during the illegal entry into the trailer. Sgt. Seymour testified during the CrR 3.6 hearing that he assisted Detective Nordstrom's efforts "for a description of the mobile home so that he could put it in his affidavit." RP (12/10/08) 58. While providing this assistance (post-entry into the trailer) he began looking for a brand name or license plate. Id. This resulted in his efforts "walking around the exterior of that building, looking for a brand name." Id. And while continuing his quest for the information for Nordstrom to include in his affidavit, Sgt. Seymour came upon several marijuana plants. Id.

As indicated, when the court eliminates the references to the illegal entry and eliminates the references to plants discovered by Sgt. Seymour, the court is left with information that is

insufficient to establish probable cause to search the trailer in question.

Respondent may argue that the officer's reported smell of burned marijuana alone justified the search warrant. However, under the circumstances of this case, the purported smell of marijuana is insufficient to establish probable cause to search the trailer.

In State v. Grande, 164 Wn.2d 135, 187 P.3d 248 (2008), the court held that the smell of marijuana alone is insufficient to establish probable cause for an arrest or search. It stated the following:

> "Our state constitution protects our individual privacy, meaning that we are free from unnecessary police intrusion into our private affairs unless a police officer can clearly associate the crime with the individual."

Id. at 145.

In the present case, the officer noted smelling burned marijuana. He did not see Appellant smoking marijuana. He simply indicated in the Declaration that one of the deputies while discussing the possibility of a consent search with Dara Ruem told him "that he could smell burned marijuana." See Complaint for Search

Warrant, 5; CP ____. The officer did not and could not associate his claim of burned marijuana with a particular person. Accordingly, this purported fact should be excluded from the actual probable cause relevant to the "independent source" analysis.

The present case is analogous to State v. Allen, 138 Wn.App 463, 157 P.3d 893 (2007). In Allen, the officers had a "reasonable, articulable basis" to stop a vehicle for a traffic infraction. Id. at 470. The officer in that case questioned the passenger without probable cause. Id. at 471. The passenger was not the subject of the infraction, and the officer lacked reasonable suspicion justifying his request for her to exit the car. Id. For these reasons, the officer "did not possess reasonable articulable facts to believe that" a no contact order related to the driver restrained him from the passenger at the time she was investigated. Id. Accordingly, when considering the evidence against the driver in his prosecution for violating a no-contact order at the time of the stop, the court held, "the identifying information [the officer] obtained

from [the passenger] does not qualify as a lawful, independent source of evidence that gave rise to the probable cause needed to arrest [the driver]. Id. Because the officer did not have a lawful basis for probable cause to arrest the driver, the arrest was deemed illegal and evidence obtained following the arrest was suppressed.

Mr. Ruem's case lacked probable cause in the same way. The entry into the trailer was illegal. The illegal entry resulted in observations that were essential to the search warrant and directly resulted in the gathering of additional information (observing several marijuana plants outside the trailer). Without the illegal entry, there were insufficient grounds for obtaining the search warrant.

The Gaines court also recognized the need to address whether the police would have sought the warrant to search Mr. Ruem's trailer absent the illegal search. Id. at 721, *citing* Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472, 108 S. Ct. 2529. For all the same reasons indicated in the above argument, it can only be said that the police would not have sought a warrant without

having viewed the plants during their illegal entry. The "course of predictable police procedures" referenced in Gaines is not present in this case. See, Gaines at 721. Therefore, this case does not support the notion that the police would have ultimately been able to search the trailer.

CONCLUSION

For the reasons cited above and the authority cited herein, Appellant asks this court to find the "independent source" exception to the exclusionary rule inapplicable to his case. Because the initial entry into the trailer was illegal, the court should exclude all references and suppress as fruit of the poisonous tree.

RESPECTFULLY SUBMITTED this 23rd day of December, 2010.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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